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SUPREME COURT, U.S.

(4)
No. 06-595

In The Supreme Court of the United States

TYLER CHASE HARPER, ET AL.,

Petitioners,

vs.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
ARGUMENT		1
I.	No Further Factual Development is Needed to Preliminarily Enjoin the School's Ban on Negative and Offensive Speech	1
II.	Respondents Failed in Their Attempt to Reconcile the Split in the Circuits the Decision Below Causes	2
	A. Third Circuit	3
	B. Sixth Circuit	5
	C. Second Circuit	6
III.	Respondents Attempt to Resolve the Conflict with Precedent of this Court by Ignoring Much of It	7
	A. Chase Harper's T-Shirt was Not Disruptive	7
	B. *Fraser* Does Not Apply Here, and Does Not Authorize Viewpoint Discrimination	9
IV.	This Court's Ruling in *Morse v. Frederick* is not Likely to Resolve this Case	9
CONCLUSION		10

TABLE OF AUTHORITIES

Page

CASES

Bethel v. Fraser, 478 U.S. 675 (1986) 7, 9, 10

Castorina ex rel. Rewt v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001) 5, 6, 9

Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) 9, 10

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) 6, 9

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 9, 10

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 3, 4

Saxe v. State College Area School Dist., 240 F.3d 200 (3rd Cir. 2001) 3, 4, 6, 9

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) 4, 6, 7 8

ARGUMENT

Respondents concede a number of matters that weigh in favor of Petitioners. First, they do not oppose the intervention of Kelsie Harper in this petition, thus eliminating any mootness concerns. Respondents' Brief in Opposition at 26 ("Resp. Brf.") Second, although this Court's forthcoming opinion in *Morse v. Frederick* is not likely to resolve all of the issues in this case, *see* Section IV *infra*, Respondents concede that *Morse* "will affect the litigation of this case." *Id.* at 13. Therefore, if certiorari is not granted, this matter should be held pending resolution of *Morse*.

Finally, respondents concede that their policy and practice allow school officials at Poway High School ("School") to censor student speech that reflects a viewpoint which the school deems negative or offensive. The Ninth Circuit's refusal to preliminarily enjoin this policy and practice directly conflicts with decisions of the Third, Sixth, and Second Circuits and this Court. The School's attempt to minimize these conflicts ignores Petitioners' challenge to the policy on its face, and their request that enforcement be enjoined while this case is pending. Continued enforcement of these viewpoint discriminatory policies is violating the rights of Kelsie Harper and other students on a daily basis, warranting certiorari as soon as possible.

I. No Further Factual Development is Needed to Preliminarily Enjoin the School's Ban on Negative and Offensive Speech.

There is no need to further develop the material facts in this case. Preliminary injunction is warranted even

under the Respondents' version of the facts. They concede they have a policy and practice prohibiting negative views. Resp. Brf. at 17 ("a viewpoint may be limited in 'instances of derogatory and injurious remarks'"). *See also id.* at 8, 9 (students can only express positive views). Respondents also concede that Chase Harper's shirt was censored because it "could possibly be offensive to others." Resp. Brf. at 6.

Respondents' contention that certiorari should be delayed completely ignores the Harpers' request that the unconstitutional school policies be preliminarily enjoined, both as applied and facially. Appendix 65a n.12 ("App."). Ongoing irreparable harm to the free speech rights of students will continue if this Court should wait to take up this matter until after the cross motions for summary judgment have been ruled upon and then considered by the Court of Appeals. Chase Harper has already been the victim of delayed justice as he graduated while the case was pending before the Ninth Circuit. The only way to avoid this same misfortune for Kelsie is to preliminarily enjoin the policies while the case is pending.

There is no need for further factual development before this Court can preliminarily enjoin the School's unconstitutional ban on "negative" and "offensive" speech. This Court should grant certiorari now to address the ongoing irreparable harm to the free speech rights of Kelsie Harper and other students while this case is pending.

II. Respondents Fail in Their Attempt to Reconcile the Split in the Circuits the Decision Below Causes.

Respondents vainly attempt to minimize the split in the circuits caused by the Ninth Circuit's opinion by

unjustifiably narrowing the conflicting rulings of the Third, Sixth, and Second Circuits. Respondents also mischaracterize the relief sought by the Harpers in an attempt to narrow the Ninth Circuit's ruling in this case. They fail to mention the Harpers' facial challenge to the School's policies – undoubtedly attempting to downplay the obvious contradiction between this case and those in other circuits.

A. Third Circuit

Respondents gloss over the obvious conflict between the Ninth Circuit's ruling in this case and *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001), by pointing out that the Third Circuit did not consider an as-applied challenge in that case. This argument holds no water because the Harpers requested that enforcement of the impermissibly overbroad school policies be enjoined as to all students, not just as applied to them. App. 65a, n.12. Overbreadth is exactly the ground upon which the Third Circuit relied in striking down the school policy in *Saxe* that also banned offensive, derogatory, and negative speech. 240 F.3d at 217.

Respondents' argument also fails to consider that the ruling in *Saxe* was very broad precisely because it was a facial challenge based on overbreadth. This "strong medicine" is used when there is no way to construe a government restriction on speech to avoid constitutional problems. *R.A.V. v. St. Paul*, 505 U.S. 377, 411-412 (1992). The Third Circuit determined that there was no way to constitutionally construe or apply the policy in that case. Since the School's policies here are remarkably similar to those found unconstitutional on their face in *Saxe*, the

Ninth Circuit's refusal to enjoin the policies facially and as applied to the Harpers necessarily conflicts with the Third Circuit's determination that such policies can never be applied in a constitutional fashion.

Respondents' contention that *Saxe* did not consider whether the policy at issue infringed upon the rights of others is groundless. The Third Circuit specifically held that, while the precise scope of this language in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), is unclear, "it is certainly not enough that the speech is merely offensive to some listener." 240 F.3d at 217. In the same paragraph, the court determined that the school policy prohibiting "negative" and "derogatory" speech concerning sexual orientation was unconstitutional. It is difficult to imagine a clearer conflict between cases.

Finally, Respondents completely mischaracterize *Saxe* as "acknowledg[ing] that schools have a compelling interest to suppress speech that may be deemed harassment to others. . . . " Resp. Brf. at 23. In reality, the entire opinion in *Saxe* expressed concern that broad anti-harassment policies like the one in that case, and the policy in this case, may violate free speech rights. "Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint." 240 F.3d at 207 (referring to the unconstitutional ordinances in *R.A.V.*). This case is even easier than *Saxe* because viewpoint discrimination is blatant. Resp. Brf. at 15 ("when one particular opinion disrupts the classroom or interfere [sic] with schoolwork or discipline or the rights of others, then it may be silenced. . . .") *See also*

id. at 8, 9 (students may only express "positive" viewpoints).

B. Sixth Circuit

The Sixth Circuit's determination in *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001), that viewpoint-based discrimination is illegal in public schools was not merely a passing reference to the issue. The court's analysis of this issue is four pages long and concludes that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols and not others." 246 F.3d at 544.

The Ninth Circuit ruled completely to the contrary, stating: "[P]ublic schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred." App. 32a. Of course, determining whether a particular view is intolerant, bigoted, or hateful is solely in the unfettered discretion of school officials and the Ninth Circuit.

Respondents argue that Chase Harper was told that "he could voice his opinion on the issue of homosexuality, and Chase was encouraged instead to explain his viewpoint in a way that did not demean others." Resp. Brf. at 24. There is no citation to the record for this fact because none exists. Chase and his parents were actually told that he could not express his view of homosexual behavior because it was "negative." App. 154a, 348a, & 358a. Respondents do not even attempt to explain how disagreement with homosexual behavior can be expressed in

a positive w[illegible] Notably, the School has censored students wearing T-shirts containing the words "straight pride." App. 179a, 184a. This message was censored even though it arguably is more "positive" than "Stop the Hate" (speech by participants in the Day of Silence which was permitted. App. 180a.)

Even if Chase was told he could express his view, and even if he could figure out a way to do it so that school officials would think it is "positive," it does not fix the School's overly broad policy and practice of censoring all negative views that may be considered demeaning or derogatory – even if they are not disruptive. This is exactly what the Sixth Circuit determined schools cannot do in *Castorina*.

C. Second Circuit

The School argues that there is no conflict with *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), because that case only addressed the "substantial disruption" requirement of *Tinker*. Resp. Brf. at 25. Of course that is precisely the point – the Second Circuit, like most other courts, views *Tinker* as only allowing censorship of student speech if it is substantially disruptive. "Infringement upon the rights of others" is just part of the disruption analysis. *See* App. 20a, n.12 (where the Ninth Circuit recognizes its decision conflicts with the analysis in *Saxe* and accuses that court of "conflating" the "rights of others" analysis with "substantial disruption").

The Second Circuit did not limit its opinion to political speech, contrary to Respondents' assertions, but also addressed speech that may be considered "offensive and repugnant." *Id.* at 328. Even if it had, the policy and

practice in this case applies to political speech, and the Ninth Circuit recognized that Chase's speech was political. App. 14a ("Harper's speech embodies the very sort of political speech that would be afforded First Amendment protection outside the school setting").

III. Respondents Attempt to Resolve the Conflict with Precedent of this Court by Ignoring Much of It.

The School's attempt to square the Ninth Circuit opinion with this Court's precedent conspicuously fails to address the cases protecting offensive speech and prohibiting viewpoint discrimination. *See* Petition for Writ of Certiorari at 15-18, 25-27 for examples of these cases. Instead, the School wrongly claims Chase Harper's speech was disruptive by misconstruing *Tinker* (ignoring Harpers' facial claim yet again), and misinterprets *Bethel v. Fraser*, 478 U.S. 675 (1986), to justify censorship of student views with an "improper tone."

A. Chase Harper's T-shirt was Not disruptive.

It is telling that one of the facts the School uses to show Chase's speech was disruptive is "the previous year's 'Day of Silence' had resulted in 'volatile behavior' and 'tensions between students. . . .'" Resp. Brf. at 15, n. 1. Thus, the School censored one side of the debate (Chase's) because the other side's event was disruptive the previous year. This inverse "Heckler's Veto" defies logic.

The School then cites alleged "disruption in the class," *id.*, apparently referring to a teacher's testimony that, "[a]fter seeing the shirt, I quickly looked around to see if its message had caused a disruption. It had: I observed

several students off-task talking. . . ." App. 352a. An alleged "tense conversation" Chase had with another student is also cited.[1] These incidents do not rise to the level of substantial disruption, especially when one considers the facts of *Tinker*. *See* App. 50a-52a for Judge Kozinki's analysis of the weakness of this evidence of disruption. In *Tinker* this Court found no substantial disruption despite the fact that

> students made hostile remarks to the children wearing armbands[, 393 U.S. at 508, and] . . . their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

Id. at 517 (Black, J., dissenting).

Chase's speech was not substantially disruptive.

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[1] Respondents misstate the record by claiming that previous Days of Silence were disruptive because of the speech of students opposed to it, citing pages App. 343a, 347a, and 352a. But neither these pages, nor any other facts in the record, indicate that the disruption was caused by the students opposed to the Day of Silence. The only thing that is clear is that the Day of Silence had been disruptive in the past. "This year, because of what occurred last year, there were clearer guidelines set by the administrators for the Day of Silence so as not to cause disruption in the educational environment." App. 247a. The Respondents have never cited any facts indicating opponents to the Day of Silence caused the disruption.

B. *Fraser* Does Not Apply Here, and Does Not Authorize Viewpoint Discrimination.

Respondents blatantly mischaracterize *Fraser* as broadly requiring students to express their views "with a tone that does not offend the sensibilities of other students." Resp. Brf. at 17. The word "tone" is not even in the *Fraser* opinion. More importantly, *Fraser* dealt with sexually explicit speech in a school assembly and the school had a right to disassociate itself from this vulgarity. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).[2] The School's policies in this case ban a wide range of "negative" and "demeaning" speech that is not sexually explicit and does not take place in school assemblies. Chase's speech was not sexually explicit by any stretch of the imagination, and did not take place in a school assembly.

Finally, unlike the School's censorship in this case, the *Fraser* restrictions "were unrelated to any political viewpoint." 478 U.S. at 685. The Ninth Circuit did not base its ruling on *Fraser* for good reason. It is not applicable here.

IV. This Court's Ruling in *Morse v. Frederick* is not Likely to Resolve this Case.

Poway High School is censoring the speech of the Harpers and other students because it disagrees with their message. This is exactly what the school did in *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), when it punished a student for displaying an offensive sign that conflicted

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[2] *See also Castorina*, 246 F.3d at 541, *Saxe*, 240 F.3d at 214, and *Guiles*, 461 F.3d at 327-28, for examples of lower courts that read *Fraser* as being limited to lewd, vulgar, or profane language.

with the school's own views regarding drug use. The Ninth Circuit held in that case that the Constitution prohibits viewpoint-based censorship of student speech that is not school sponsored and this Court should affirm that holding. *Id.* at 1123.

The Ninth Circuit should have reached the same conclusion in this case. But instead it altered the student speech analysis by holding that "demeaning" and "derogatory" viewpoints infringe on the rights of others and can be banned – something no other federal court has ever done. No such holding was made by the Ninth Circuit in *Morse*.

This Court granted certiorari in *Morse* on December 1, 2006 on two questions – both of which hinge on the issue of whether the student's speech in that case took place at a school-sponsored, faculty-supervised event. In the case at hand, the School's ban on negative and offensive speech is not limited to school-sponsored speech, and neither side has ever argued that Chase Harpers' speech took place at some sort of school-sponsored event. In fact, the Respondents contend that the Day of Silence was not sponsored by the School. Resp. Brf. at 3. This Court's opinion in *Morse* is therefore likely to focus on the possible applicability of *Kuhlmeier* and *Fraser*, neither of which is applicable here.

CONCLUSION

The Court should grant certiorari outright because the Ninth Circuit's errors go beyond the issues in *Morse*. Alternatively, Respondents concede that *Morse* will affect the decision in this case so it should be held pending the decision in *Morse*.

Respectfully submitted,

January 11, 2007

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